United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/affidavit of mailing

75-1114

To be argued by
RICHARD APPLEBY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1114

UNITED STATES OF AMERICA,

Appellee,

—*against*—

GARY SINGLETON, WILLIAM M. KIRBY
and WILLIAM ELMORE,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
RICHARD APPLEBY,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1114

UNITED STATES OF AMERICA,

Appellee,

—against—

GARY SINGLETON, WILLIAM M. KIRBY and WILLIAM ELMORE,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Gary Singleton, William Elmore and William Kirby appeal from judgments of the United States District Court for the Eastern District of New York (Bartels, *J.*) entered on different dates, convicting them, following a jury trial, of violating Title 18, United States Code, Sections 1708 and 2, as charged in the one count indictment, in that they did unlawfully have in their possession the contents of stolen mail, knowing the same to have been stolen. Appellant Singleton was sentenced on May 29, 1975 to treatment under Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. § 4253, for a period of four years. Appellant Kirby received the same sentence on April 23, 1975. Appellant Elmore was sentenced on March 14, 1975 as a youthful offender to an indeterminate six-year term of imprisonment pursuant

to 18 U.S.C. § 5010(b) of the Youth Corrections Act. All appellants are presently serving their sentences.

Appellants raise a number of issues on this appeal. All appellants contend that there was insufficient evidence to convict them. Appellants also contend that plain error was committed when the trial judge, in response to a note from the jury, failed to charge them in a manner which appellants now claim would have been advisable. Appellants Singleton and Kirby contend that the trial judge unduly interfered with the conduct of the trial. Singleton and Kirby also contend that they should have been sentenced under the Youth Corrections Act rather than the Narcotic Addict Rehabilitation Act. Finally, appellant Singleton alone contends that the prosecutor misused a stiuplation, which was signed by his attorney, when he read its contents to the jury.

Statement of the Case

A. The Government's Case

George Atmore, a letter carrier with the Postal Service, was the Government's main witness (86).[1] He testified that on June 17, 1974 he was delivering mail in a residential section of Jamaica, Queens. After having parked his mail jeep the corner of 130th Avenue and 146th Street at approximately 12:00 noon, Atmore began to deliver a section of his assigned route on foot. After he had completed this section and had returned to his jeep to pick up another bundle of mail, Atmore noticed a 1968 or 1969 automobile with a black vinyl top parked so close to his mail jeep "there was no room to walk

---

[1] Page references in parenthesis refer to pages in the trial transcript.

between the two" (105). Atmore observed two individuals inside the car and one individual outside the car (105). Atmore delivered another section of mail in the same area but continued to keep the automobile under observation from a patron's home approximately 18 feet from the jeep.

From this vantage point, Atmore got "a good look" at the three individuals (110). Atmore then observed the individual who was standing outside the Falcon "suddenly bend over into the window of the car" and remain that way (114). Atmore identified in court appellant Singleton as the individual in the driver's seat and appellant Kirby as the individual in the passenger seat of what Atmore now knew to be a Ford Falcon (110-112). Atmore testified that he had seen Kirby on at least seven or eight occassions prior to June 17, 1974 (280).[2]

Although Atmore could not identify Elmore as the individual standing outside the Falcon, he described that person as weighing between 175-180 pounds, approximately 5′ 10″ - 5′ 11″ in height, wearing a dark pair of slacks, a multi-colored shirt and a cap with a soft peak (113-114, 274). An arrest photograph of Elmore was taken the same day, showing him to be an individual fitting the physical description Atmore gave of him at trial. Furthermore, the arrest photograph shows Elmore to be wearing a multi-colored shirt, dark slacks and a soft-brimmed hat (Government Exhibit 15). Finally, it should be noted that Elmore's counsel conceded in his summation that the individual standing outside the automobile was, indeed, Elmore (475).

---

[2] Atmore also identified Singleton and Kirby from an array of photographs on June 25, 1974. Atmore failed to identify Elmore from the array.

Atmore then finished this section of his mail route and returned to his jeep (114). As he approached the rear of the jeep, Atmore observed the Falcon move slowly from the jeep and cross an intersection (115; Government Exhibit 2). From the time the Falcon pulled away from the mail jeep to the time it came to rest on the opposite side of the intersection, Elmore kept his head inside the Falcon on the driver's side (115). At this point, Atmore wrote down the license plate number of the Falcon (116).

At approximately 12:30 P.M. Atmore opened up the rear door to his jeep, removed another bundle of mail, and continued to deliver a section of his route, making sure before he departed that all doors to his jeep were locked (120). When he returned to his jeep twelve minutes later, Atmore discovered that the rear door had been jimmied, that approximately 500 pieces of mail were missing and that the Falcon was gone (125-131).

At 12:40 P.M. Atmore went to a patron's house to call his superiors to report the theft. Within twelve minutes, John Shovlin, a Special Investigator from the Postal Service, arrived. Atmore gave Shovlin a description of the three individuals as well as the license plate number and description of the Falcon (136). Shovlin then radioed the information to Postal Inspectors O'Neill, Cole and Renzulli at the Jamaica Post Office (284). The three inspectors searched for the Falcon in the Jamaica area.

Approximately one hour later, the Falcon was observed in the area of the Jamaica Post Office (285-290). Special Investigator Renzulli testified that at that point the inspectors cut off the Falcon with their unmarked Government vehicle. Inspectors Cole and Renzulli got out of their automobile, ran over to the passenger side

of the Falcon, identified themselves and ordered appellants out of the car which had remained running (294). Elmore and Kirby got out of the Falcon, at which point they were searched for weapons and given their Miranda warnings (297). While Elmore and Kirby were being searched for weapons, Singleton, who had remained at the driver's seat, jumped the curb and sped off (301). As the Falcon took off, a jacket was seen to come flying out of the right passenger window of the Falcon and land on the sidewalk (301; Government Exhibit 7). Renzulli retrieved the jacket and discovered four checks (which formed the basis of the indictment) rolled up in the jacket (Government Exhibits 9-12; 305-6). The payees of those checks were patrons on Atmore's mail route (87-88). Renzulli also found a wallet inside the pocket which contained identification belonging to Elmore. Renzulli asked Elmore and Kirby who owned the jacket. Both replied that they did not know anything about the jacket (312).

Later Elmore was taken back to the Post Office in Jamaica, at which time he admitted that he had lied, that the jacket was his, but that he did not know anything about the stolen mail (321).

As to Singleton, Postal Inspector O'Neill testified that he pursued him after placing his flashing light and siren on his vehicle. The chase was through city streets at approximately 40-60 miles per hour. Singleton was apprehended when the Falcon fishtailed and could not turn a corner (343-44).

B. The Defense

Defendant Kirby testified in his own behalf. He stated that he met Elmore at 12:50 P.M. on June 17, 1974 on the corner of 149th Street and Rockaway Boule-

vard. Kirby testified that Elmore arrived on foot and the two had intended to take a bus when Singleton approached them and offered a ride in his automobile (408-11). Flatly contradicting Atmore's testimony, Kirby stated that he was never at 146th Street and 130th Avenue in the Falcon at approximately 12:50 P.M. on June 17, 1974. Accordingly, Kirby denied participation in the theft at Atmore's jeep and contended that he had no knowledge of the checks found in Elmore's jacket (412-413).

Elmore called one witness in his case, Inspector O'Neill, who testified that the Ford Falcon was registered to Singleton.

Singleton did not offer any evidence in his own behalf.

ARGUMENT

POINT I

There was sufficient evidence to support a jury finding that appellants Singleton, Elmore and Kirby were in actual or constructive possession of the stolen mail or that they aided and abetted the actual possession of the stolen mail.

We proceed, seriatim, to deal with appellants' claims that the evidence of their guilt was somehow insufficient:

a. The Proof with Respect to the Appellant Elmore

Elmore concedes that he was present at the scene of the theft and that he was later present in the car when the checks were recovered (Elmore brief, p. 12). Elmore contends, however, there was no proof that he was in actual or constructive possession of the checks. More-

over, he maintains that he was not an aider and abettor since he was "merely present" during the commission of the crime. These contentions are without merit.

Since the stolen checks were found inside Elmore's jacket the jury could have inferred that Elmore had dominion and control over the checks. Elmore, however, counters with the argument that there is no proof that the checks were in his jacket at the precise moment that he was ordered out of the Falcon (Elmore brief, p. 16), thereby implying that Singleton may have placed the checks in the rolled-up jacket just before he threw the jacket out the window and fled.

While this is a *possible* explanation, it is certainly not the only one--nor even the more reasonable one. Since Singleton fled and threw the jacket out the window just moments after the Falcon was stopped, the jury could properly have concluded that the stolen checks were in Elmore's jacket when Elmore was in the car and that Singleton could not have had sufficient time before he fled to grab Elmore's jacket, place the checks inside, fold up the jacket, and then throw the jacket out the window.

Elmore's knowledge that the checks were stolen may have been inferred by the jury from a number of factors. First, as stated above, the stolen checks were found in his jacket. Second, solely from the very recent (one hour) possession of the checks after the theft, could the jury have inferred knowledge. Third, the jury could have inferred knowledge from Elmore's false denial of ownership of the jacket. Fourth, Elmore's conduct at the time of the theft, just one hour prior to his arrest in the Falcon, easily supports the jury's finding of knowledge on the part of Elmore that the checks were stolen.

It should be emphasized that Elmore concedes on this appeal (as his counsel did in summation) his presence at the mail jeep just prior to the theft. Based upon Elmore's bizarre behavior at the jeep, the jury could easily have inferred that Elmore participated in the theft of the checks and *a fortiori* have known of their stolen nature. Furthermore, if the jury concluded Elmore participated in the theft, they would have been ineluctably drawn to the conclusion that he had constructive possession over the checks in the Falcon.

b. The Proof with Respect to the Appellant Kirby

Kirby also contends that there was insufficient evidence to support his conviction for either constructive possession or aiding and abetting. For many of the same reasons described above with respect to Elmore, the contention is without merit.

Kirby was positively identified as being at the scene of the theft just one hour prior to his arrest in the Falcon. This fact alone would justify an inference by the jury that he had dominion and control over the stolen checks and that he knew they were stolen.

But more importantly—and Kirby ignores this fact in his brief—the jury must have taken into account Kirby's obviously perjured testimony (to the effect he was never present at the scene of the theft) when assessing whether he knew the checks were stolen and whether he had control over the checks in the Falcon. *United States* v. *Pui Kan Lam*, 483 F.2d 1202 (2d Cir. 1973) ("As a matter of common sense, the jury was entitled to take into account (on the issue of knowledge) what appears to us an incredibility inherent in Lam's story" at p. 1208). The fact of his perjured testimony must have become apparent not only through his contra-

diction of Atmore's testimony but also in his flat contradiction of his friend Elmore who conceded that the both of them were indeed present at the scene of the theft.

c. The Proof with Respect to the Appellant Singleton

Singleton also contends that there was insufficient evidence to convict him of knowing possession of the stolen checks. To support this contention he states that he was never seen outside of his car at the scene of the theft. He maintains that his flight could be explained away by an innocent "interpretation" (Singleton brief, p. 18). The argument is frivolous.

Singleton was positively identified by Atmore as the driver of the Ford Falcon at the scene of the theft. He was the registered owner of the car. Singleton was the one who fled from the scene of the arrest, jumping the curb and speeding down city streets in order to avoid being caught by the inspectors. There was no dispute that it was Singleton who threw the jacket containing the checks out the window. Singleton's conduct clearly reflected a consciousness of guilt. *United States* v. *Heitner*, 149 F.2d 105, 107 (2d Cir. 1945). From these facts and circumstances the jury must have been compelled to find Singleton guilty.

Elmore and Kirby additionally contend that if the evidence was sufficient as to only one of the two "theories" presented (i.e., aiding and abetting and constructive possession), the case must be reversed and remanded for a new trial since it would be impossible to determine on which theory the jury rested its verdict.

Appellants use of the word "theory" is ambiguous. The Government did not present two different theories in the sense that a different quantum of evidence applied

to each "theory". The Government had one "theory" of the case: that appellants were found inside the Falcon (in which was found the stolen checks) one hour after they robbed a mail jeep. Whichever way one viewed the evidence—either in terms of aiding and abetting or constructive possession—the evidence was the same. The Government did not present two theories but requested the judge to instruct the jury on two principles of law which clearly applied to the evidence, which principles were accurately stated by the judge and were not objected to by any counsel.

Appellants' reliance on the rule stated in *Nicola* v. *United States*, 72 F.2d 780, 787 (3d Cir. 1934), quoted recently in *United States* v. *Reid*, slip opinion 3073, 3095-3096 (2d Cir., April 24, 1975) is misplaced ("Where two instructions are given to the jury, one erroneous and prejudicial and the other correct, it is impossible to tell which one the jury followed and it constitutes reversible error"). That rule serves as a prophylaxis against a defendant being found guilty of a crime under erroneous instructions. Here, both principles of law—constructive possession and aiding and abetting were properly applied in the court's charge.

POINT II

The Court's charge on knowledge was proper.

Appellants have constructed a specious argument which, on plain error grounds, is that the jury was left to its own devices on the issue of knowledge. They rely upon this court's decision in *United States* v. *Howard*, 506 F.2d 1131 (2d Cir. 1914) a case in which the district court omitted in its charge just about every essential element in the crime of bank robbery. In that context, appellants claim that the jury was not properly instructed on the issue of knowledge.

It must be initially observed that Judge Bartels charged (see Appendix C of Elmore's brief) to the jury, no less than seven times in one form or the other, that they must be satisfied beyond a reasonable doubt that each of the appellants had knowledge of the stolen character of the checks. Thus, he initially told the jury that the burden was upon the Government to prove beyond a reasonable doubt that each of these appellants had knowledge that "the letter or the contents of the letter . . . were stolen or abstracted" (533). In explaining the concept of aiding and abetting to the jury, Judge Bartels carefully advised them that they must find "the defendants willfully and knowingly aided and assisted" in the commission of the crime (534-535). Once more, Judge Bartels instructed the jury: "The charge here is *knowing* possession of stolen checks. That is possession with the *knowledge* that the checks were stolen" (emphasis added) (539). The district court went on to say:

> "When I am talking about possession or aiding and abetting, I am referring to possession or aiding and abetting with knowledge that the checks were stolen. Knowledge is a key factor in this case" (539-540).

Moreover, Judge Bartels was careful to contrast the concept of knowledge with the notion of innocent presence on the scene. Thus he charged the jury: "Of course, if the possession was not with knowledge that they were stolen then that ends the case" (539). He further stated: ". . . that presence in the car in which someone has illegal possession of stolen checks is not sufficient even though he knew someone did have in his possession illegally stolen checks" (543). In addition, he stated: "You may find that there are other circumstances in the case which would justify an inference that the person who possessed the stolen property did not know that the property was stolen" (544). Finally, in what takes up more

than one page of the transcript, Judge Bartels defined the word knowledge for the jury (see transcript at pages 545-546).[3] No objection was taken to any aspect of the Court's charge on the issue of knowledge.

Against this background, appellants claim that the Court should have charged the jury that independent proof of knowledge would have to be shown in the absence of the inference arising from the possession of recently stolen property. Although we are not quite certain of the nexus, appellants claim that this failure came to haunt the jury's deliberations when it returned a note to the Court asking if there was a difference between constructive possession and aiding and abetting.

---

[3] The District Court charged as follows:

> Now, what is knowledge? To be found guilty it must be shown that the defendants had knowledge that the checks were stolen.
>
> "Knowledge" is descriptive of a state of mind and, as an element of the offense is seldom, if ever, susceptible of direct proof. As you know, we cannot physically look into a person's mind. The proof of this element of knowledge may rest, as it frequently does, on evidence of facts and circumstances from which it clearly appears as the only reasonable and logical inference that the accused had knowledge of the illegal possession of the stolen checks. No person can intentionally avoid knowledge by closing his eyes to the facts that would lead a reasonable man to investigate. However, a mere suspicion that something is wrong or improper is not equivalent to knowledge. On the other hand, knowledge may be inferred from the acts of the party and is a question of fact to be determined from all the circumstances, and the jury may scrutinize the defendant's entire conduct at the time the offenses alleged were committed. The circumstantial evidence sufficient to support a charge of knowledge of illegal possession of stolen checks must be sufficiently persuasive, however, as to exclude the inference of innocence.

Taking the charge as a whole, we believe that any attentive juror would have recognized that "independent proof of knowledge would have to be shown" (Elmore's brief, p. 19) irrespective of the inference arising from possession. Moreover, we fail to see how "plain" error was committed when Judge Bartels answered the jury's note. Certainly, error was not so "plain" to counsel for these appellants who voiced no objection. Indeed counsel for Elmore, having given the matter some thought, concluded as the Court had (and as it had instructed the jury) that in reaching a verdict it made no difference whether they took an aiding or abetting "path" or a constructive possession "path" (566). Moreover, to the extent that the jury may have been concerned with imagined differences concerning the issue of knowledge (they did not use the word knowledge in the note), it should be realized that Judge Bartels, in his main charge, told the jury that whether he was talking about "possession *or* aiding and abetting" he was talking about "knowledge . . . the key factor in this case." The subsequent charge that "other circumstances in the case" which would justify an inference that the person who possessed the stolen property did not *know* that the property was stolen" (539-540, 544), served to mark off the proper route for the jury to follow in its analysis of the evidence.

POINT III

Judge Bartels' conduct of the case in no way deprived appellants of a fair trial.

Appellants Singleton and Kirby contend that Judge Bartels unduly interfered with the trial, depriving them of a fair trial. They further contend that Judge Bartels' treatment of Edward Malz, counsel to Singleton, deprived both appellants of a fair trial. Singleton claims he was thereby denied effective assistance of counsel.

While a trial judge must avoid at all times even the appearance of partiality, *United States* v. *Glaziou*, 402 F.2d 817 (2d Cir. 1968), *cert. denied*, 393 U.S. 1121 (1969), he is entitled to interrupt the examination of witnesses and to ask questions himself in order to clarify the issues of the trial. *United States* v. *Curcio*, 279 F.2d 681, 682 (2d Cir.), *cert. denied*, 364 U.S. 824 (1960); *United States* v. *Pellegrino*, 470 F.2d 1205, 1206-1208 (2d Cir. 1972), *cert. denied*, 411 U.S. 918 (1973).

Indeed, the trial judge cannot discharge his responsibility to see that the law is properly administered "by remaining inert". *United States* v. *Marzano*, 149 F.2d 923, 925 (2d Cir. 1945). The judge "enjoys the prerogative, rising often to the standard of a duty of eliciting those facts he deems necessary to the clear presentation of the issues." *United States* v. *Brandt*, 196 F.2d 653, 655 (2d Cir. 1952). The judge should play an active role ". . . where necessary to clarify testimony and assist the jury in understanding the evidence." *United States* v. *De Sisto*, 289 F.2d 833, 834 (2d Cir. 1961).

When viewed in the light of the foregoing authority, the record as a whole and especially the conduct of Singleton's counsel, appellants' arguments are revealed as being without merit. The instant case bears little resemblance to appellants' extreme precedents, save for the number of times that it was necessary for Judge Bartels to interrupt counsel for Singleton when he either repeated questions, testified from the lecturne or persisted in exploring irrelevancies. Yet, it is settled law that mere mathematical computations of the number of questions asked by a judge do not furnish a basis for reversal. *United States* v. *De Sisto*, *supra*, 289 F.2d at 834. Here, when the specific instances of judicial participation underlying the computation are examined it will be found that the judge's actions were well within his proper discretion and responsibility.

The thrust of appellants' argument centers around Judge Bartels' interruptions of and conduct toward Singleton's counsel, Mr. Malz. An examination of the record will reveal that Judge Bartels interrupted Mr. Malz only when his cross-examination became repetitive and began to explore irrelevant areas. The only two examples of the judge's undue interference cited by Kirby (Kirby brief, p. 23) reveal that the judge, at worst, was annoyed by the repetition of testimony that was already prolonging the trial.

Singleton cites alleged examples of the judge's undue interference (Singleton brief, pp. 27-33). Without examining in detail the context of each interruption, it should be pointed out that many citations are to the pretrial hearing or to colloquy outside the presence of the jury.[4] A reading of the record demonstrates that Judge

---

[4] In a scattershot approach, from pages 27 through 33 of his brief, Singleton takes every remark the trial judge made during the course of the trial, whether it be in or out of the presence of the jury, and places a pejorative flavor upon them. Little attempt is made to adhere to the record itself. For example, at pages 29 and 31 of his brief, Singleton gratuitously states there was "laughter in the courtroom". The record does not support this statement (251, 375).

Similarly, Singleton's characterizations of the judge's remarks or actions are his subjective impressions and unfair to the context of those remarks. To take a few examples, at page 27 of his brief, Singleton states that the trial judge "seems to ridicule defense counsel on Ford Falcon." There is no evidence of that in the record (112, 113, 117). At page 29 of his brief, Singleton states the court "practically forc(ed) defense counsel to conference in the hall" (256-257). The record references show Mr. Malz to have asked the judge to confer with his colleagues. At page 30 of his brief, Singleton states the judge asked "damaging questions". In fact, the record shows the judge to be merely clarifying confusing testimony (303, 305). On many occasions in his brief Singleton contends the judge "helped" the prosecutor. The record will show that, rather than

[Footnote continued on following page]

Bartels was most careful to criticize Mr. Malz outside the presence of the jury. The only criticism Mr. Malz received from the judge was with respect to his tendency to elicit cumulative testimony and that criticism was mild at most. Moreover, Judge Bartels' criticism was directed at Mr. Malz' conduct as an attorney and not at the strength of Singleton's defense. There never was any indication that the trial court's comments were directed at anything but the conduct of Singleton's counsel. See *United States* v. *Boatner*, 478 F.2d 737 (2d Cir.), *cert. denied*, 414 U.S. 848 (1973). It was also significant that the prosecutor received his share of criticism from the judge as well. See 40, 269 (out of presence of jury); 100, 149, 155, 277 (in presence of jury).

The record reveals that the decision upon which appellants rely are clearly based on facts dissimilar to the facts in this case. In *Nazzaro*, in addition to rehabilitating a prosecution witness and taking an active part in the cross-examination of defense witnesses, the trial judge engaged in numerous acrimonious exchanges with defense counsel in the presence of the jury. *United States* v. *Nazzaro*, 472 F.2d 302, 307-308, 311 (2d Cir. 1973). In *United States* v. *Brandt*, 196 F.2d 653, 655-56 (2d Cir. 1952), the court actively cross-examined defense witnesses, including the defendant himself, while *Guglielmini* involved a trial where the judge harassed and disparaged

---

being solicitous of the prosecutor, the judge was clarifying issues for the jury.

The sharpest criticisms that Mr. Malz received from the judge were outside the presence of the jury, although in most instances Singleton's brief does not so indicate. The citations to pages 173-74 and 389-397 are references to colloquy outside the presence of the jury.

Many of the citations are irrelevant on the question of Judge Bartels' alleged partisanship. It is difficult to see what relevance citations to pages 267, 318-319, 383, 387, 429-30 and 431 have to this issue.

defense counsel in the presence of the jury. *United States* v. *Guglielmini*, 384 F.2d 602, 604-605 (2d Cir. 1967).

Even where a judge has played "a more active role than may be desirable in most cases," a conviction should be affirmed where the judge has properly charged the jury that they are to draw no conclusions from his participation. *United States* v. *D'Anna*, 450 F.2d 1201, 1206 (2d Cir. 1971). In the case at bar the trial judge at length instructed the jury to draw no conclusions from his statements or rulings (525). Indeed, even in a case where the trial judge showed extreme hostility to defense counsel, the conviction was upheld since ". . . the trial court's comments did not create an impression that he personally believed in the appellant's guilt." *United States* v. *Boatner*, *supra*, 478 F.2d at 740; see also *United States* v. *Pellegrino*, 470 F.2d 1205, 1207 (2d Cir.), *cert. denied*, 411 U.S. 918 (1973).

Finally, Singleton's claim that he was denied effective assistance of counsel because of the judge's interference is specious. Singleton does not cite any evidence that he was unable to introduce or an area of cross-examination that he was not permitted to explore, with the exception of an allegation (Singleton brief, p. 31) that he was not permitted to adequately develop why he took flight from the postal inspectors. An examination of the record reveals that Judge Bartels was only preventing Mr. Malz from eliciting from a postal inspector how many cylinders a 1968 Ford Falcon has (381)!

Ineffective representation of Singleton, if any existed, resulted from Mr. Malz' conduct and not from Judge Bartels' interference. In this context it should be noted that Mr. Malz, apparently for strategic reasons, attempted to use his "ineffectiveness" to elicit sympathy from the jury, both in his summation and during the course of the trial (247, 482, 484).

POINT IV

The stipulation was properly read to the jury and the motion to inspect was properly denied.

Appellant Singleton's contention with respect to the stipulation that he signed along with all defense counsel is completely without merit, *cf. United States* v. *Pravato*, 505 F.2d 703 (2d Cir. 1974) and scurrilous to boot. The tagalong contention respecting pretrial disclosure and inspection of the grand jury minutes is also baseless. See *United States* v. *Tane*, 329 F.2d 848, 853 (2d Cir. 1964).[5]

POINT V

It was not error for Judge Bartels to sentence Singleton and Kirby under the Youth Corrections Act rather than the Narcotic Addict Rehabilitation Act.

Judge Bartels sentenced both Singleton and Kirby under Title II of the Narcotic Addict Rehabilitation Act of 1966, 18 U.S.C. § 4253 ("NARA") for a period of four years after both had previously been sent for examination under NARA and found to be eligible. Singleton and Kirby contend that they should have been sentenced under the Youth Corrections Act, 18 U.S.C. § 5005 et seq. ("YCA"). The claim is that since they would receive the same treatment under both Acts they should have been sentenced under the Youth Corrections Act since the later Act would permit their convictions to be ex-

---

[5] We do not understand the thrust of appellant Singleton's comments concerning *Bruton* v. *United States*, 391 U.S. 123 (1968). If he means to complain of the admission of Elmore's post-arrest statements concerning the ownership of the jacket, there is no proper ground for complaint. See generally, *United States* v. *Lobo*, 516 F.2d 883 (2d Cir. 1975) and cases cited therein.

punged and would avoid exposing them to hardened criminals during their period of incarceration.

The sentencing minutes of both appellants will reveal that Judge Bartels considered sentencing them under YCA but rejected that alternative because of appellants' addiction. Accordingly, the judge sentenced appellants under NARA.[6]

Appellants' contention that they would receive the same treatment under the two Acts is simply not true. First, under YCA a sentence may be expunged see, 18 U.S.C. § 5021; whereas under NARA no such possibility exists. Second, the treatment one receives is different under each Act. The definition of "treatment" in each Act reflects this difference. NARA was clearly enacted to treat drug addicts for their peculiar problem. The treatment under YCA is more in the nature of vocational and educational training. See 18 U.S.C. § 5011 ("Treatment").

Third, under YCA a youth offender may be unconditionally discharged prior to the expiration of the maximum sentence imposed upon him. Further, under YCA, where a youth offender has been placed on probation by the court, the court may thereafter discharge such offender unconditionally prior to the maximum period of probation fixed by the court. 18 U.S.C. § 5021(b). NARA is entirely different. Under Section 4253 ("Commitments") an addict is committed for an indeterminate sentence not to exceed ten years. When an addict has been so committed, he may not be released even conditionally until he has been committed for six months. After the

---

[6] In rejecting YCA treatment for Singleton, Judge Bartels made an express finding that YCA treatment was inappropriate. (See sentencing minutes, May 29, 1975 at page 9). Appellant Kirby has not had the minutes of his sentencing transcribed. He implicitly concedes, though, that such a finding was made.

six month period, the Board of Parole may conditionally release the addict. After he has been conditionally released, the addict remains in the custody of the Attorney General while he undergoes "Supervision in the Community" pursuant to Section 4255.

The experienced trial judge must have had all of these factors in mind as well as appellants' prior criminal records, when he sentenced appellants under NARA rather than YCA. Since Judge Bartels made the requisite "no benefits" finding his judgment may not be disturbed on appeal. *Dorszynski* v. *United States*, 418 U.S. 424 (1974); *United States* v. *Kaylor*, 491 F.2d 1133, 1137-39 (2d Cir. 1974) (en banc).

CONCLUSION

The judgments of conviction should be affirmed.

Dated: September 22, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
RICHARD APPLEBY,
Assistant United States Attorneys,
Of Counsel.

★ U. S. Government Printing Office 1975— 614—353—140

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 24th day of September, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Edward Malz, Esq.
16 Court St.
Brooklyn, N.Y. 11241

Harry Blum, Esq.
130 Clinton St.
Brooklyn, N.Y

William Gallagher, Esq.
Federal Defender Serv. Unit
LAS, 26 Court St.
Brooklyn, N.Y. 11201

Evelyn Cohen

Sworn to before me this
24th day of Sept. 1975

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-3480350
Qualified in Kings County
Commission Expires March 30, 1977

E NOTICE that the within
for settlement and signa-
of the United States Dis-
s office at the U. S. Court-
han Plaza East, Brooklyn,
---- day of ----------,
o'clock in the forenoon.

New York,
----------, 19----

---

tates Attorney,
for ----------

E NOTICE that the within
----------duly entered
day of ----------
n the office of the Clerk of
Court for the Eastern Dis-
t,
New York,
----------, 19----
---
tates Attorney,
for ----------

---------- Action No.----------

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

United States Attorney,
Attorney for ----------
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within ----------
----------is hereby admitted.
Dated: ----------, 19----

Attorney for ----------

FPI-LC-5M-8-73-7355